UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

M. SALEEM KHAN,

Plaintiff,

v.

PARK CAPITAL SECURITIES, LLC; ANTHONY JOHN JOHNSON; GARY JOHN FERRERA; PHILIP ANTHONY ORLANDO; STEPHEN MICHAEL MAGEE; BLAKE JUSTIN SHANAPHY; JASON JOSEPH WILDE; THE CONCORD EQUITY GROUP; and TD WATERHOUSE INVESTOR SERVICES, INC.,

Defendants.

Case No. C 03-00574 RS

ORDER RE DEFENDANTS' MOTIONS TO COMPEL ARBITRATION (Doc. Nos. 5, 7, 16, 17)

I. INTRODUCTION

Defendant TD Waterhouse Investor Services, Inc. ("TD Waterhouse") moves to compel arbitration, to stay proceedings against it, and to strike plaintiff's declaration. By separate motion, defendants Park Capital Securities, LLC ("Park Capital"), the Concord Equity Group ("Concord"), and Anthony Orlando ("Orlando") (collectively "the Park Capital defendants") move to compel arbitration and stay proceedings against them. Plaintiff M. Saleem Khan ("Khan") opposes these motions. The parties

filed briefs and oral arguments were heard on July 2, 2003 and July 16, 2003. For the reasons set forth below, TD Waterhouse's motion to compel arbitration and to stay proceedings against it is granted, its motion to strike Khan's declaration is granted, its motion for costs and fees is denied, and the Park Capital defendants' motion to compel arbitration and to stay proceedings against them is denied.

II. BACKGROUND

On March 1, 1999, plaintiff Khan opened an individual brokerage account at TD Waterhouse's San Jose, California branch office. At that time, Khan was required to execute a new account application. The application stated that the customer agreed to be bound by the terms of a Customer Agreement, which in turn contained a pre-dispute arbitration clause. The arbitration clause stated:

> Any controversy relating to any of [the customer's] accounts will be settled by arbitration in New York or the city of the branch where [the customer's] account is maintained in accordance with the rules of the New York Stock Exchange or the National Association of Securities Dealers.

TD Waterhouse contends that this clause forecloses judicial resolution of any claims that Khan has against it.

Khan's complaint alleges that in July, 2001, he began receiving solicitation telephone calls from Anthony John Johnson ("Johnson"), a Park Capital employee. Khan eventually opened a Park Capital account and claims that Park Capital subsequently charged improper commissions, artificially marked up the execution price of trades, made trades without his consent, and committed other fraudulent practices. When Khan set up his Park Capital account, representatives instructed him to complete a customer account form with the clearing house that physically executed trades for the brokerage. At that time, Bank of New York ("BNY") provided clearing services for Park Capital through an agreement with Concord. Khan completed an account application with BNY containing an arbitration clause. Park Capital later changed clearing firms to Dain Rauscher ("Dain"), and Khan purportedly executed agreements with Dain which contained arbitration clauses. Park Capital, Concord, and Orlando seek the benefit of the arbitration clauses contained in the clearing firms' agreements.[1]

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[1] Park Capital refers to itself as an "introducing broker" and to Dain and BNY as "clearing brokers." "In industry parlance, an introducing broker is the firm whose account executives deal with customers, i.e., solicit orders and offer recommendations. A clearing broker, on the other hand, has no client contact, but places and executes orders with the exchange at the direction of the

III. STANDARD

Section 2 of the Federal Arbitration Act ("FAA") provides, in relevant part, that arbitration agreements involving commerce "shall be valid, irrevocable, and enforceable, save upon such grounds that exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." Ticknor v. Choice Hotels Int'l, Inc., 265 F.3d 931, 937 (9th Cir. 2001) (quoting Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 686 (2000)). When deciding whether parties have agreed to arbitrate under a contract, courts "apply ordinary state-law principles that govern the formation of contracts." First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995).

IV. ANALYSIS

A. TD Waterhouse's Motion to Compel Arbitration

TD Waterhouse moves to compel arbitration based on a Customer Agreement signed by Khan that unambiguously required him to submit "any controversy" related to his TD Waterhouse account to arbitration. Khan argues that the contract is unconscionable because the terms of arbitration require him to pay excessive fees, and because the arbitration forum limits his class action remedies.

1. Choice of Law

Because plaintiff contends that the arbitration provisions at issue are unenforceable based on unconscionability, state law governs this issue. *See* Ingle v. Circuit City Stores, Inc., 328 F.3d 1165 (9th Cir. 2003) (applying California law when determining that an arbitration clause in an employment contract was unconscionable); Ticknor, 265 F.3d 931 (finding an arbitration clause governed by the FAA unconscionable under Montana law). However, the parties do not address squarely which state law is applicable. Although TD Waterhouse's Customer Agreement contains a choice of law provision favoring New York law, neither party has elected to invoke that provision.[2] By choosing not to seek the application of New York law, the parties have waived any argument that it applies for the purposes of the present motion. *See* Malnove. v. Hearthside Baking Co., 951 F. Supp. 151 (N.D. Ill. 1997) (ruling that the parties

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introducing broker." Van Luven v. Rooney Pace, Inc., 195 Cal. App. 3d 1201, 1203 (1987).

[2] Paragraph 8 of the TD Waterhouse Customer Agreement states that New York law governs the agreement and its enforcement. (DiPippo Decl., Exhibit B.)

waived the benefits of a contractual choice of law provision requiring application of Nebraska law by arguing through trial that Illinois law applied to the dispute); Clarklift of Northwest Ohio v. Clark Equip. Co., 869 F. Supp. 533, 536 (N.D. Ohio 1994) ("By proceeding under Ohio law for so long . . . [plaintiff] effectively waived its right [to] the contract provision providing that Michigan law applies.").

In the absence of an asserted contractual choice of law provision, the Court applies the default rule that "[f]ederal courts sitting in diversity look to the law of the forum state in making a choice of law determination." Ticknor, 265 F.3d at 937. California Civil Code § 1646 states that "[a] contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made." Here, plaintiff executed his TD Waterhouse account documents at defendant's branch office located in San Jose, California and presumably the contract was "performed" in multiple locations, including California. Thus, a California court would apply California contract law to the current dispute. *See* Szetela v. Discover Bank, 97 Cal. App. 4th 1094, 1100 n.3 (2002) (applying California law in a credit card dispute where defendant bank did not establish that the law of another state should apply and waived a contractual choice of law provision). Accordingly, to the extent that any state law governs the question of whether TD Waterhouse's arbitration clause is unconscionable, the Court applies California law.

Arbitration clauses are unconscionable under California law where there is "both a procedural and substantive element of unconscionability." Ferguson v. Country Wide Credit Indus., 298 F.3d 778**,** 783 (9th Cir. 2002) (citing Armendariz v. Found. Health Psychcare Serv., Inc., 24 Cal. 4th 83, 114 (2000)). "Pursuant to Armendariz, courts apply a sliding scale: the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." Ting v. AT&T, 319 F.3d 1126, 1148 (9th Cir. 2002) (internal quotation omitted).

2. Procedural Unconscionability

Under California contract law, "[a] contract or clause is procedurally unconscionable if it is a contract of adhesion." Comb v. Paypal, Inc., 218 F. Supp. 2d 1165, 1172 (N.D. Cal. 2002) (citing Flores v. Transamerica Homefirst, Inc., 93 Cal. App. 4th 846, 853 (2001) ("A finding of a contract of adhesion is essentially a finding of procedural unconscionability.")). The California Supreme Court has defined a

contract of adhesion as a "standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only to adhere to the contract or reject it." Armendariz v. Found Health Psychcare Serv., Inc., 24 Cal.4th 83, 113 (2000).

Here, plaintiff contends that the Customer Agreement is procedurally unconscionable because defendant drafted the arbitration agreement without allowing plaintiff to change or bargain the terms. Defendant argues that the contract at issue is not an adhesion contract because defendant was not a party of superior bargaining strength. Defendant points out that Khan could have sought the services of other brokerage houses. However, "a claim of procedural unconscionability cannot be defeated merely by '*any* showing of competition in the marketplace as to the desired goods or services.'" Comb, 218 F. Supp. 2d at 1173 (quoting Dean Witter Reynolds, Inc. v. Superior Court, 211 Cal. App. 3d 758, 772 (1989)). Therefore, TD Waterhouse cannot rely solely on the argument that plaintiff had an opportunity to obtain similar services elsewhere without having to submit to an arbitration clause.[3] Thus, the non-negotiable nature of the terms of the Customer Agreement supports a showing of procedural unconscionability under California law.

3. Substantive Unconscionability

In addition to demonstrating procedural unconscionability, a plaintiff must also establish substantive unconscionability in order to render an agreement unenforceable. Armendariz, 24 Cal. 4th at 114 (citing Stirlen v. Supercuts, Inc., 51 Cal. App. 4th.1519, 1533 (1997)). "Substantive unconscionability addresses the fairness of the term in dispute." Szetela, 97 Cal. App. 4th at 1100. Here, plaintiff only makes two arguments in support of his contention that the TD Waterhouse arbitration provision is substantively unconscionable: (1) arbitration requires him to bear prohibitive costs; and (2) the provision impermissibly limits his class action remedies.

When arguing that an arbitration provision is unconscionable due to excessive costs, the party seeking to avoid arbitration bears the burden of establishing that he is unable to pay the associated costs. Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 92 (2000). Meeting this standard requires

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[3] Arbitration provisions are standard in the securities industry. *See* Davis v. Prudential Securities, Inc., 59 F.3d 1186, 1193 n.7 (11th Cir. 1995). Therefore, it is unlikely that plaintiff could have opened a securities account elsewhere without submitting to an arbitration provision.

more than just speculation that plaintiff will be "saddled with prohibitive costs." Id. at 91. Rather, a court "must look to the particular language pertaining to the payment of fees and costs (if such language exists), as well as to the actual costs and to the claimant's financial situation." Spinetti v. Service Corp. Int'l., 240 F. Supp. 2d 350, 353-54 (W.D. Pa. 2001). Financial hardship can be shown if a party can "demonstrate an inability to pay the arbitration fees and costs" to support an assertion that such fees and costs would deter the party from arbitrating its claims. Spinetti, 240 F. Supp. 2d at 354.

Assuming without deciding that a cost unconscionability analysis is applicable in the securities setting, plaintiff has not made a showing that the costs of arbitration would be prohibitive. He has merely stated that the initial filing fee is $975.00 and set forth the following facts related to his financial condition: (1) he does not have *liquid* assets; and (2) he is currently unemployed. These facts do not conclusively support the contention that plaintiff is unable to afford the costs of arbitration, rather they simply suggest that plaintiff may face a financial challenge in litigating this case either through arbitration or in this Court.

Defendant also argues that the arbitration provision at issue is substantively unconscionable because it limits class action remedies. However, in this instance, plaintiff has not asserted class action claims and therefore Khan lacks standing to assert this basis for invalidating the arbitration provision. Because plaintiff has failed to show that TD Waterhouse's arbitration provision is unconscionable, the Court grants TD Waterhouse's motion to compel arbitration and to stay proceedings relative to that defendant.

B. TD Waterhouse's Motion to Strike Plaintiff's Declaration

Pursuant to the local rules, plaintiff was required to file any declarations in support of his opposition at least 21 days before the hearing date of July 2, 2003. Civil. L.R. 7-3 (a), (d). Plaintiff filed a declaration on June 21, 2003 purporting to bolster his contention that arbitration would be prohibitively expensive. This declaration was filed after TD Waterhouse had served a reply setting forth the evidentiary deficiencies in plaintiff's opposition. Because plaintiff did not meet the filing deadline and because the admission of this late filed evidence would be unfair to TD Waterhouse, the Court grants defendant's motion to strike plaintiff's declaration.[4]

[4] The admission of plaintiff's declaration would not have altered the Court's analysis.

C. TD Waterhouse's Motion for Fees and Costs

TD Waterhouse seeks costs and fees incurred in bringing the present motion. Such an order would be improper for three reasons: (1) the sanctions motion was not separately filed as required by Civil L.R. 7-8(a); (2) TD Waterhouse does not specify the rule or statute under which it seeks fees and costs; and (3) while ultimately lacking sufficient evidentiary support, plaintiff's unconscionability argument is not frivolous.

D. The Park Capital Defendants' Motion to Compel Arbitration

Although non-signatories to the arbitration clauses at issue, the Park Capital defendants move to compel arbitration based on agreements that Khan signed with clearing brokers BNY and Dain. Khan opposes the motion, arguing that the Park Capital defendants are not entitled to enforce the arbitration provisions contained in the clearing agreements.

1. Choice of Law

An agreement to arbitrate a commercial dispute is enforceable as a matter of federal law under the FAA, however, federal courts turn to state law when deciding whether parties have agreed to arbitrate claims in the first instance. Perry v. Thomas, 482 U.S. 483, 493 n.9 (1987). As with TD Waterhouse's motion to compel, the parties have not addressed specifically which state law the Court should apply in deciding whether or not the Park Capital defendants are entitled to the benefits of the clearing brokers' arbitration clauses. Likewise, none of the parties has suggested that a contractual choice of law provision governs the issue. As addressed above, the Court therefore applies California law when interpreting the BNY and Dain contracts.

2. The Express Terms of the BNY Agreements

The BNY Margin Account Agreement and Loan Consent document ("BNY Margin Agreement") signed by Khan contained the following language:

> The undersigned agrees, and by carrying an account for the undersigned you agree that all controversies which may arise between us concerning any transaction or the construction, performance, or breach of this or any other agreement between us pertaining to securities . . . shall be determined by arbitration. (BNY Margin Agreement, at ¶ 18.)

The agreement gave the customer the power to elect between an arbitration at a securities exchange or a self regulatory organization. Id. To effectuate this election, the customer was required to send a registered letter or telegram addressed to the clearing broker at its main office before the expiration of [a designated

time period]. Id. The remainder of paragraph 18 contained other terms related to forum election and class action remedies, but is illegible due to the extremely poor quality of the photocopy provided to the Court.

Paragraph 19 is aimed at insulating the clearing broker from liability based on the actions of the introducing broker, stating that the clearing broker shall "without any inquiry or investigation" accept orders and other instructions from the introducing broker. The paragraph goes on to state that the customer agrees that the clearing broker,

> shall have no responsibility or liability to the [customer] for any acts or omissions of [the introducing broker]. The undersigned's broker has authorized you to enter into this agreement with the undersigned on its behalf, and the terms and conditions hereof, including the pre-dispute arbitration provision, shall be applicable to all matters between the undersigned, the undersigned's broker and you.

The identical language from paragraphs 18 and 19 is found in the BNY cash account agreement that Khan signed.

Under defendants' interpretation of the explicit terms of paragraph 19, a dispute only between Park Capital and Khan must be submitted to arbitration. In support of this proposition, they cite two cases. In Macaulay v. Norlander, 12 Cal. App. 4th 1 (1992), a California Court of Appeal allowed a non-signatory introducing broker to enforce an arbitration agreement found in the customer agreement of the clearing broker. Likewise, the Court in Ziegler v. Whale Securities Co., 786 F. Supp. 739 (N.D. Ind. 1992) reached the same result. However, neither of these cases construed a provision requiring the arbitration of disputes between the customer, the customer's broker *and* the clearing broker, as presented here. The contract before the Macaulay court specifically stated that "each reference to 'we' or 'us' in [the arbitration clause] shall be understood to include" the introducing broker. Macaulay, 12 Cal. App. 4th at 3 n.2. The Ziegler court engaged in an analysis of the following clause: "The terms and conditions of this agreement, including the arbitration provision, shall be applicable to all matters between [the introducing broker] and [the customer]." Macaulay and Ziegler thus stand for the straightforward proposition that if the scope of a clearing broker's arbitration clause in a contract explicitly extends to customer disputes against the introducing broker, courts will enforce such a provision.

Plaintiff argues that paragraph 19 only relates to disputes concerning all three entities named: the clearing broker, the customer, and the introducing broker. Defendants argue that such an interpretation of paragraph 19 renders it superfluous in light of paragraph 18. Apparently, the Park Capital defendants

believe that disputes concerning all three entities would necessarily be arbitrated pursuant to the terms of paragraph 18. This interpretation is not persuasive. By its terms, paragraph 18 only covers disputes between the customer and the clearing broker. Thus, if a customer brought a claim against the clearing broker and the introducing broker in the absence of paragraph 19, only those claims against the clearing broker would be subject to arbitration. Paragraph 19 ensures that "if arbitration occurs between [a clearing broker] and one of its customers, then every other party to the dispute also will participate in the arbitration so that one forum can provide complete relief." Stone v. Doerge, 328 F.3d 343, 346 (7th Cir. 2003).

A Colorado state court has interpreted the very phrase currently at issue:

> We read the language relied upon by defendant, specifically the phrase "shall be applicable to all matters between . . . the undersigned, the undersigned's broker and you" to mean that the arbitration provision is to apply to disputes that concern all three entities . . . . Here, [the clearing broker] is not named as a party in plaintiff's suit against defendant; therefore, the terms and conditions of the margin agreement, including the arbitration provision, do not apply to the dispute.

Everett v. Dickinson & Co., 929 P.2d 10 (Colo. App. 1996). The Court agrees with this interpretation and likewise interprets the phrase "the pre-dispute arbitration provision, shall be applicable to all matters between the undersigned, the undersigned's broker and you" to mean exactly what is says: the arbitration provision applies to matters between the customer, the introducing broker, and the clearing broker. The clause simply does not address the mandatory arbitration of disputes exclusively between the customer and the introducing broker. *See* Van Luven v. Rooney Pace, Inc., 195 Cal. App. 3d 1201, 1207-08 (1987) (noting that "an introducing broker who fails to obtain its own written customer agreement cannot enforce that of a broker operating in a completely different capacity who does"); Arista Films, Inc. v. Gilford Securities, Inc., 43 Cal. App. 4th 495 (1996) (denying introducing broker's motion to compel arbitration where the arbitration provision did not specifically mention the introducing broker). Accordingly, the express terms of the BNY accounts do not require Khan to submit claims against the Park Capital defendants to arbitration.

This interpretation does not contravene the "strong federal policy in favor of arbitration . . . ." Zielger, 786 F. Supp. at 741. As the court in Stone noted:

> Nothing in the Federal Arbitration Act overrides normal rules of contractual interpretation; the Act's goal was to put arbitration on a par with other contracts and eliminate any vestige of old rules disfavoring arbitration. Arbitration depends on agreement, and nothing beats

> normal rules of contract law to determine what the parties' agreement entails. There is no denying that many decisions proclaim that federal policy favors arbitration, but this differs from saying that courts read contracts to foist arbitration on parties who have not genuinely agreed to that device. . . . As there is no thumb on the scale in favor of one judicial forum over another, there is no preference for arbitration over adjudication either. Our job in a case such as this is to implement the parties' preferences between judicial and arbitral forums, not to displace that choice with one of our own.

328 F.3d at 345-46. Indeed, federal circuit courts generally have been hostile to the attempts of introducing brokers to enforce arbitration provisions contained in clearing firm agreements. *See* Stone v. Doerge, 328 F.3d 343 (7th Cir. 2003); Arrants v. Buck, 130 F.3d 636 (4th Cir. 1997) ("We now join the many federal courts which . . . do not allow an introducing broker to invoke the clearing broker's arbitration clause."); Taylor v. Investors Assocs., 29 F.3d 211 (5th Cir. 1994) (per curiam); McPheeters v. McGinn, Smith & Co., 953 F.2d 771 (2d Cir. 1992); Mowbray v. Moseley, Hallgarten, Estabrook & Weeden, Inc., 795 F.2d 1111 (1st Cir. 1986); *but see* Nesslage v. York Secur., Inc., 823 F.2d 231 (8th Cir. 1987).

3. The Express Terms of the Dain Agreements

The Park Capital defendants claim that plaintiff executed two account agreements with Dain requiring the present suit to be submitted to arbitration. The Margin Agreement is attached as Exhibit "D" to the declaration of Diane Matuszewski and is thoroughly illegible. *See* Docket No. 19, Exhibit "D." The Park Capital defendants allege that the Margin Agreement contained the following language:

> The client [plaintiff] agrees that any controversy arising out of or relating directly or indirectly to this Agreement, or any investment by the client hereunder, or with respect to transactions of any kind executed by or with [Dain], or with respect to this agreement or any other agreements entered in to with Dain Rauscher relating to the Accounts with Dain Rauscher or the breach thereof, shall be settled by arbitration . . . .

The Park Capital defendants have also provided a blank new account form and claim that although they cannot produce a signed copy of this agreement, "[u]nder Park Capital's practices, transactions on a client's account could not have been processed unless this New Account Form had been signed and return [sic] to Park Capital." (Matuszewski Decl. ¶ 12.) Park Capital "believes" that plaintiff signed the new account form, "[h]owever after diligent search of the Park Capital's files" it was unable to find the signed form. The language in this missing document purportedly stated that Khan agreed to arbitrate all disputes "between the undersigned and (a) your brokerage firm . . . and (b) BBC Dain Correspondent Services . . . concerning any transaction" subject to the agreement.

With respect to the Dain Margin Agreement, the Court assumes that the above-quoted language appeared in the document that Khan signed. However, defendants' failure to provide a legible copy of the agreement prevents the Court from utilizing the doctrine that "[the] whole of a contract is to be taken together, so as to give effect to every part . . . each clause helping to interpret the other." Cal. Civil Code § 1641. Rather, the Park Capital Defendants would have the Court compel arbitration based on the isolated clause it presents. If the excerpted portion unquestionably required an order compelling arbitration, such a procedure might not be objectionable.[5] Here, however, the text of the Margin Agreement broadly requires the arbitration of disputes between Khan and Dain but does not address the proper forum for disputes between Khan and an introducing broker. In such circumstances, the Court does not interpret the excerpt from the Margin Agreement to require arbitration between Khan and the Park Capital defendants. *See, e.g.*, Taylor, 29 F.3d 211 (5th Cir. 1994) (denying introducing broker's motion to compel arbitration where customer's contract with the clearing broker required arbitration of "any controversy arising out of or relating to my account.").

An executed copy of Dain's new account agreement has not been presented to the Court and Khan disputes that he signed any such document. The Court finds unavailing the Matuszewski declaration stating that Khan must have signed the agreement because transactions would not have been processed on his account otherwise. Such a speculative statement cannot serve to demonstrate that a party in fact signed a contract. The Park Capital defendants have thus failed to make a showing that the terms of the new account agreement are operative between the parties.[6]

4. Third Party Beneficiary & Agency Principles

Having determined that the express terms of the BNY and Dain agreements do not require Khan to arbitrate his claims against the Park Capital defendants, the Court addresses two other theories under

[5] For instance, if this was Dain's motion to compel arbitration, the excerpted clause would not require any context for interpretation.

[6] Even if the Court were to consider the arbitration language of the Dain new account agreement, it would be subject to same interpretation as the BNY arbitration provisions.

which an order compelling arbitration might be appropriate: (1) third party beneficiary; and (2) agency.[7] "A third party beneficiary may enforce a contract made for its benefit. However, a putative third party's rights under a contract are predicated upon the contracting parties' intent to benefit it. Ascertaining this intent is a question of ordinary contract interpretation." Hess v. Ford Motor Co., 27 Cal. 4th 516 (2002) (citations omitted). The Park Capital defendants argue that they are intended beneficiaries of the Dain agreements[8] because "Park Capital, in order to execute transactions on Plaintiff's account, needed to use a clearing broker. Dain was the clearing broker that Park Capital used, and signing the [agreements] was a necessary step to that end." However, under California contract law, mere awareness on the client's part that both the clearing firm and introducing firm play a part in executing trades is not enough to trigger third party beneficiary status for the introducing broker. Arista, 43 Cal. App. 4th at 503 (absent an express agreement to arbitrate, a customer's "mere awareness of the [introducing broker/clearing broker] relationship is insufficient to bind [the customer] to arbitration with the [introducing broker]."). The Park Capital defendants are therefore not third party beneficiaries of the Dain agreements. Likewise, they have not alleged that they are entitled to enforce the arbitration provision as agents of either BNY or Dain. In fact, Paragraph 19 of the BNY Margin Agreement expressly disavows an agency relationship between the clearing broker and the introducing broker (BNY "shall have no responsibility or liability to the [customer] for any acts or omissions of [the introducing broker].").

The Park Capital defendants' motion to compel arbitration is denied. The express terms of the agreements at issue do not require arbitration between the customer and the introducing broker. Likewise, defendants are not third party beneficiaries of the Dain agreements and they are not agents of the clearing brokers.

Accordingly, it is, hereby,

ORDERED:

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[7] *See* Van Luven, 195 Cal. App. 3d at 1208 n.2 (noting that an introducing broker might be able to enforce an arbitration agreement between a customer and a clearing broker "[u]pon a showing of third party beneficiary status [or an] agency relationship").

[8] Defendants do not argue that they are third party beneficiaries of the BNY agreements.

(1) Defendant TD Waterhouse's motion to compel arbitration and stay proceedings against it is GRANTED;

(2) Defendant TD Waterhouse's motion to strike plaintiff's declaration is GRANTED;

(3) Defendant TD Waterhouse's motion for costs and fees is DENIED;

(4) The Park Capital defendants' motion to compel arbitration and stay proceedings against them is DENIED.

IT IS SO ORDERED.

Dated: July 22, 2003

/s/ Richard Seeborg
RICHARD SEEBORG
UNITED STATES MAGISTRATE JUDGE

THIS IS TO CERTIFY THAT A COPY OF THIS ORDER WAS ELECTRONICALLY MAILED TO THE FOLLOWING:

Attorneys for Defendants:

Gregory K. Jung gjung@steinhart.com
Julie A. Kole julie.kole@kyl.com
Cara L. Meredith cara.meredith@kyl.com

Attorneys for Plaintiff:

Javed I. Ellahie javed@ellahie.net
Matthew Rafat mattrafat@yahoo.com

Counsel are responsible for distributing copies of this order to co-counsel who have not registered for e-filling under the Court's CM/ECF program.

Dated: July 22, 2003

/s/
Chambers of Magistrate Judge Richard Seeborg